

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION SUMMARY FOR BOARD HEARING

In the Matter of the Administrative Protest)	
Under the Sales and Use Tax Law of:)	
)	Account Number: SR CH 53-002956
REBECCA ANN SCHERZ)	Case ID 416659
)	
Taxpayer)	Brentwood, Contra Costa County

Type of Liability: Responsible person liability
 Liability period: 04/01/03 – 04/15/04

<u>Item</u>	<u>Disputed Amount</u>	<u>Tax</u>	<u>Penalty</u>
Responsible person liability	\$10,034		
As determined and protested:		None	\$9,902.42
Determined tax			\$ 00.00
Interest (tax paid in full before determination was issued)			131.90
Late payment penalties originally assessed against LLC			<u>9,902.42</u>
Total interest and penalty			\$10,034.32
Payments			<u>46.01</u>
Balance Due			<u>\$ 9,988.31</u>

UNRESOLVED ISSUES

Issue 1: Whether taxpayer is personally liable as a responsible person under Revenue and Taxation Code section 6829 for the unpaid liabilities of Ask Us First! LLC (SR CH 97-713214). We find that taxpayer is liable.

Ask Us First (AUF) was a retailer of printed material until April 15, 2004, when it sold the business to Froyd Salek (SR CH 100-387304), doing business as Axis Print. When it ceased operations, AUF had unpaid tax-related liabilities. The Sales and Use Tax Department (Department) concluded that Mr. Salek was liable as a successor for those liabilities and issued a determination to Mr. Salek in November 2004. Mr. Salek paid the amount of tax due, but submitted a request for relief of the penalties assessed against AUF, which was granted on the grounds that there was no relationship between AUF and Mr. Salek. (Cal. Code Regs., tit. 18, § 1702, subd. (d)(2).) The Department found

1 that taxpayer was liable as a responsible person under section 6829 for the remaining unpaid tax-
2 related liabilities of AUF.

3 Taxpayer did not file a timely petition for redetermination, but the Department accepted a letter
4 dated August 2, 2007, as an administrative protest. Taxpayer contends that she is not liable for AUF's
5 unpaid tax-related liabilities because Mr. Salek assumed those liabilities. Taxpayer refers to a specific
6 item in the sales agreement that described an outstanding sales and use tax (SUT) liability of
7 \$110,000.00 to be paid by Mr. Salek. Taxpayer also contends that she should not be held liable for any
8 amounts that became due after April 15, 2004, because, when the business was transferred to
9 Mr. Salek, she no longer had control over AUF's accounts receivable or checking account. Taxpayer
10 asserts that on April 15, 2004, she and her husband handed over all of AUF's books and records to
11 Mr. Salek, and that Mr. Salek is responsible for all tax-related liabilities originally incurred by AUF.

12 There is no dispute that two of the four requirements for imposing liability under section 6829
13 have been met. AUF ceased business operations by April 15, 2004, and taxpayer concedes that AUF
14 collected tax reimbursement with respect to its retail sales of tangible personal property. The issues in
15 dispute here are the two remaining requirements for imposing liability under section 6829, whether
16 taxpayer was a person responsible for AUF's compliance with the Sales and Use Tax Law and whether
17 taxpayer willfully failed to pay the taxes owed by AUF, or cause them to be paid.

18 Taxpayer signed AUF's SUT returns for the second quarter 2003 (2Q03), 3Q03, and 4Q03,
19 showing that she had a duty to act for AUF in SUT matters for those periods. Also, taxpayer
20 personally discussed AUF's tax liabilities with Board staff on January 8, 2004, and requested a
21 payment plan to pay the liability that existed at that time. This contact shows taxpayer had direct
22 involvement in SUT matters for AUF. Further, taxpayer has presented no evidence that her
23 responsibilities related to AUF changed after January 31, 2004, when the return for 4Q03 (which
24 taxpayer signed) became due. In addition, on March 31, 2004, and on April 14, 2004, taxpayer signed
25 documents related to the sale of AUF as a member of AUF. Her signatures as "member" of AUF
26 indicate that her responsibilities related to AUF remained the same throughout the period at issue, and
27 taxpayer has not argued otherwise, except for the period after April 15, 2004, when the business was
28 sold to Mr. Salek.

1 Taxpayer contends that she was not a responsible person with respect to the tax due for the
2 1Q04 and the first 15 days of April 2004. Taxpayer states that, on April 15, 2004, a check was issued
3 by AUF to Mr. Salek for the balance remaining in AUF's checking account, and all of AUF's books
4 and records were turned over to Mr. Salek. On that basis, taxpayer argues that, as of April 15, 2004,
5 she no longer had any control over AUF's accounts receivable or checking account. However,
6 taxpayer still had an obligation to wrap up AUF's affairs in relation to its operation of the business,
7 including ensuring that it reported and paid the taxes for its last two quarters of operation. In that
8 regard, we note that AUF filed a SUT return for the 1Q04 and a prepayment form for the period
9 April 1, 2004, through April 15, 2004. Further, we find that taxpayer's voluntary decision to turn over
10 all money in AUF's checking account and its books and records to Mr. Salek on April 15, 2004, did
11 not abrogate taxpayer's continued responsibility to act for AUF in SUT matters. For all these reasons,
12 we find that taxpayer was a person responsible for ensuring AUF's SUT compliance for the period
13 April 1, 2003, through April 15, 2004.

14 With regard to whether taxpayer willfully failed to pay the tax, or cause it to be paid, the failure
15 to pay the tax may be willful even if it was not done with a bad purpose or evil motive. The first
16 requirement for willfulness is knowledge. Since taxpayer signed the SUT returns for 2Q03, 3Q03, and
17 4Q03, which were filed without remittance, it is clear that taxpayer knew AUF had not paid its tax-
18 related liabilities for those periods. Further, taxpayer communicated directly with Board staff on
19 January 8, 2004. Taxpayer has not argued she was unaware that AUF owed the subject tax debts, but
20 indicated at the conference that the taxes were not paid because of "cash flow issues." Based on this,
21 our finding of her responsibility for AUF's tax compliance, and the fact that the sales agreement listed
22 an outstanding tax liability of AUF of \$110,000, we find that taxpayer knew of AUF's unpaid
23 liabilities.

24 The next requirement for willfulness is that taxpayer was able to pay the taxes when due, or
25 cause them to be paid. Here, taxpayer admits, and the evidence shows, that she had check-writing
26 authority. Further, we note that AUF paid various suppliers during the period at issue, as detailed in
27 the D&R. Also, AUF reported on its SUT returns that it continued to make sales throughout the
28 liability period, and therefore had funds coming in. Thus, we find that taxpayer acted consciously and

voluntarily by choosing to pay other liabilities instead of paying AUF's tax-related liabilities.

Accordingly, we find that taxpayer's failure to pay AUF's tax-related liability for the period April 1, 2003, through April 15, 2004, was willful, and that she is personally liable as a responsible person within the meaning of section 6829 for AUF's unpaid interest and penalties for the period at issue.

We find no merit in taxpayer's contention that AUF's successor, and not taxpayer, should be held liable. Mr. Salek's successor liability does not preclude a finding that taxpayer is personally liable for the same unpaid AUF liabilities because she was a responsible person under section 6829. As for taxpayer's argument that Mr. Salek agreed in the sales agreement to assume all debts incurred by AUF, that provision is enforceable only against the other party to the agreement. The parties' agreement is not a valid defense to taxpayer's statutory liability to the Board at issue here.

Issue 2: Whether relief of the late-payment penalties originally assessed against AUF is warranted. We find no basis upon which to recommend relief.

The penalties at issue were automatically assessed against AUF because it did not timely pay the tax it reported was due. There is no statutory or regulatory authority for relieving penalties in determinations issued pursuant to section 6829. However, section 6592 provides that late-payment penalties may be relieved if the Board finds that a person's failure to timely pay a return was due to reasonable cause and circumstances beyond the person's control.

Taxpayer submitted a declaration signed under penalty of perjury requesting relief of the penalties, which is based on the same grounds addressed above under Issue 1. She provides no explanation for AUF's failure to timely pay the taxes due. Also, we note that taxpayer's explanation at the appeals conference, that AUF's failure to timely pay the tax was due to "cash flow issues," does not represent reasonable cause. Accordingly, we find there is no basis upon which to recommend relief of the late-penalty payments assessed against AUF. We further find, for the reasons explained above under Issue 1, that Mr. Salek's contractual assumption of all debts is not a basis to relieve taxpayer of her liability as a responsible person under section 6829 for the penalties at issue.

OTHER DEVELOPMENTS

None.

Summary prepared by Deborah A. Cumins, Business Taxes Specialist III